**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 451 OF 1999**

1. Baburao Shankar Kate, aged 70 years, ]
2. Eknath Baburao Kate, aged 50 years, ]
3. Sudam Eknath Kate, aged 23 years, ]
all r/o. Vavi, Tal. Sinnar, Dist. Nashik. ] .. Appellant (Ori. Accused Nos.1, 2 & 4

Versus

The State of Maharashtra. ]
(Through Vavi Police Station, Sinnar, ]
Nashik.) ] .. Respondent.

Mr. A.P. Mundaragi with Mr. N.Y. Kale, Advocate for the appellants / accused.

Mrs. P.H. Kantharia, A.P.P., for the respondent/State.

**CORAM: V.G. PALSHIKAR &**
**ANOOP V. MOHTA, JJ.**

**DATED: OCTOBER, 2004.**

**ORAL JUDGMENT:** *[ Per Anoop V. Mohta, J. ]*

1. The present common Appeal has been preferred by the appellant Nos.1, 2 and 3 who were the original accused Nos.1, 2 and 4, against the

judgment and order dated 6th August, 1999, passed by the Additional Sessions Judge, Nasik, whereby, appellant No.2, Eknath, has been convicted for the offence punishable under Section 302 of the IPC and sentenced to suffer rigorous imprisonment for life. He has also been convicted under Section 325 of the IPC and sentenced to suffer rigorous imprisonment for four years along with appellant No.1-accused No.1 Baburao and both were sentenced to suffer rigorous imprisonment for four years, and to pay fine as imposed. Appellant No.1, however, has been acquitted under Section 325 and 404 and 506 of the IPC. Appellant No.3-accused No.4 Sudam, has been convicted under Section 323 of the IPC and sentenced to suffer simple imprisonment for six months and to pay fine, as ordered. The accused No.3 - Kusum has been acquitted from all the charges. Therefore, this Appeal against the order of conviction.

2. It has been held by the learned Additional Sessions Judge that the appellant No.2 has committed the murder of the deceased Shrihari Kate. The appellant No.1 and appellant No.2 had assaulted the complainant Bapu Kate, his wife Gitabai and the deceased Shrihari Kate by means of a wooden rod and an axe in furtherance of their common intention. It has

been held against the appellant No.3 that he had voluntarily caused grievous hurt to the complainant, his wife and his mother.

3. The prosecution's case, in a nutshell, is as follows. On account of the common “bandh” (fence), The dispute between the appellant's family and the complainant' sfamily have been going on since more than 30 to 40 years. There are criminal complaints pending between the parties. On 19th June, 1997, PW1-complainant Bapu Kate lodged a complaint in Vavi Police Station Taluka Sinnar and alleged therein that appellant No.1 and 2 while ploughing their field, came near the “bandh” in question, therefore, the complainant objected and went near the bandh. This was at about 12 noon, when his mother PW2-Smt. Gitabai and his father deceased Shrihari were also working in their field. The deceased Shrihari Kate also came near the bandh. The quarrel erupted. The Appellant No.1 after abusing, suddenly, started beating the deceased with the wooden handle of plough. Appellant No.2, came there with an axe and assaulted the deceased on his head. PW2-Gitabai came to rescue him, but she was also beaten on the head and legs. P.W-Laxmibai was also beaten by appellant no.3/accused no.4. One Kusum Kate and the appellant No.3 who were

near the place of the incident, had also beaten, abused and threatened the complainant. Immediately, after the above complaint was lodged by the complainant, appellant No.2 had also lodged a complaint in the same Police Station against PW1, PW2 and the deceased Shrihari Kate, alleging therein that on 19th June, 1997, at about 12.00 noon, when the appellant No.2 and his father, appellant No.1, were ploughing their lands, the deceased Shrihari Kate and his son PW1, Bapu Kate Gitabai – PW2 and Laxmibai PW3 came there. The deceased was holding an iron bar in his hand. The complainant-PW1 was holding *koyta* (sickle) in his hand. PW2 was holding a stick. The deceased Shrihari Kate assaulted appellant No.1 on his head with the iron bar. When appellant No.2 tried to rescue him, the complainant PW1 caught him and hit on the left side of his breast with the *koyta*. The ladies were abusing them saying that this was a right opportunity to finish and bury them, then and there only. The complaint was registered under C.R. No. 36 of 1997 against PW1, PW2 and the deceased for the offence punishable under Section 324, 447, 504, 506 read with Section 34 of IPC.

4. The Police had referred PW1, the deceased and appellant No.1

and 2 in the hospital for the treatment. Appellant No.1 had also sustained multiple and serious injuries on his head and other parts of the body. The Police, however, arrested appellant in C.R. No.35 of 1997 filed by PW1. The counter case of the appellants C.R. No.36 of 1997 was also committed to the Sessions Court, Nashik for trial along with the case against the appellants. It may be noted here that the deceased Shrihari succumbed to the injury. Therefore, in C.R. No.35 of 1997, against the appellants, as registered for the offences punishable under Section 324, 323, 504 and 506 read with 34 of IPC, was converted into 302 IPC and tried accordingly.

5. The charges, as framed, were denied by the appellants and, therefore, they were tried. The prosecution has led evidence of 12 witnesses. However, the appellants led no evidence in reference to C.R. No. 36 of 1997. The learned Judge, thereafter, considering the material placed on the record, convicted the appellants, as referred above.

6. We have heard the learned counsel appearing for the appellants and the learned A.P.P. for the respondent/State. We have gone through the testimony of all the witnesses, as well as, the record of the case with

the assistance of the Advocates for the parties. The Advocate for the appellants submitted that the evidence of PW1, 2 and 3 are full of vital contradictions on the point of the alleged incident. The failure to take into consideration those contradictions led to the wrong conviction. The complaint (Exhibit-23) itself could not have been accepted as the same was based on the suppression of various facts and false accounts of the events. It was not even fully corroborated by PW1, 2 and 3. The disputes between the parties are pending since long. The injuries sustained by the appellant Nos.1 and 2 have not been explained by any witness and/or by the prosecution. PW2 in fact admitted in her evidence that appellant No.1 had also sustained injuries and was admitted in the hospital. The material contradictions remained unexplained. The material witnesses have not been examined during the trial. The scene of the offence was also doubtful. No blood stains were found on the spot in the field of PW2 as per the Panchanama (Exhibit-41). There was no injury on the front side of he head of the deceased, but the injury was found on the vertex and extending to the occipital. The C.A. Report also did not discloses blood on the axe and the wooden handle. Therefore, the story of the prosecution about the use of the axe and

the wooden handle was totally false. The learned Judge has committed serious error in convicting the appellant No.2 for the offence punishable under Section 302 of the IPC. The case of the appellant of the right of private defence was totally overlooked, including the authorities as relied and cited by the appellants. The learned A.P.P., however, has supported the prosecution case, as well as, the impugned judgment. PW6 and PW11 have proved the P.M. Report(Exhibit-50), which was conducted by Dr. Chumble, who died in an accident. The blow on the head by the handle of the plough can cause the nature of injury in question, as reported, and same was cause of the death. During the quarrel, the deceased had suffered blows and other injuries. He succumbed to the said injury on the next day. The appellants had also suffered injuries during the said quarrel. The complaint and counter complaint between the parties through C.R. No. 35 and 36 of 1997 are also part of the record.

7. The crucial point is whether appellant No.2 had committed the murder of Shrihari Kate and all the other accused had common intention to kill Shrihari Kate. The assault by the appellants was on the deceased and because of the sudden altercation and quarrel. The fatal blow given by

Eknath – appellant No.2 resulted into the death of Shrihari Kate. But in view of the background of the earlier quarrels and disputes pending between the parties and the sudden provocation, according to us, indicates that there was no preplaning or intention to kill the deceased Shrihari Kate. However, the intention was definitely to attack and/or injure the deceased Kate and the other family members. The learned Additional Sessions Judge has not accepted the prosecution case insofar as accused No.1 is concerned, by rightly holding that there was no intention to kill the deceased by attacking with the handle of the plough, but, the learned Additional Sessions Judge has accepted the prosecution's case that accused No.1 wanted to cause grievous hurt to the deceased Shrihari Kate. Accused No.2 had also assaulted the mother of the complainant Bapu Kate by means of an axe and she had sustained injury on her right leg and head. Accused No.1 Baburao had also assaulted and caused grievous hurt to PW2 – Gitabai Kate. Therefore, there remains no doubt so far as the offence committed by the accused under Section 325 of the IPC is concerned, as the accused wanted to cause grievous hurts to the deceased and other injured persons.

8. Appellant No.3-accused No.4 Sudam Kate has also been convicted under Section 323 of IPC. Accused No.3 Kusum Eknath Kate has been acquitted. There is an ample evidence on the record to justify the conviction as awarded against accused No.4 as the evidence of PW - Bapu, PW2 – Gitabai, PW3 – Laxmibai has supported the case of attack by appellant No.3 – accused No.4. We have also gone through the evidence of all these witnesses and we see that the order passed by the learned additional Sessions Judge of convicting the appellants under Section 325 of the IPC, as duly proved by the prosecution, is correct.

9. However, we are of the view, that in the facts and circumstances of the case, this is not a case of conviction under Section 302 of IPC as passed in the present case against accused No.2. PW1 - Bapu is the only witness, based on whose evidence, the conviction has been passed against the appellant No.2 under Section 302 of the IPC. The prosecution case was not fully corroborated by other evidence. The testimony of such interested and related witness, and the enmity between the parties, mitigates the circumstance to maintain the conviction under Section 302 in the present case. PW1 in his complaint, as well as, in his evidence, gave

different stories regarding the place of the occurrence and incident itself. The complaint (Exhibit-23) itself is unable to support or corroborate the evidence of PW1, 2 and 3, fully. The Spot Panchanama, as well as, the spot of the incident was also in dispute. PW1 deposed that he was at a distance of 200 to 300 feet away when the appellant No.1 caught hold of the deceased Shrihari. However, the same was not the version in the complaint (Exhibit-23) when he stated therein that he was just near his father Shrihari. In the complaint, he further alleged that there was a talk between him and the appellant Nos.1 and 2 preceding the assault, thereafter his father deceased Shrihari came there. The appellant No.1 was unable to give the correct Gut No. This witness deposed that the appellant No.2 gave a blow with an axe and, therefore, his father deceased Shrihari fell down and appellant No.1 gave a blow to the deceased with the handle of the plough. No other witnesses have corroborated this testimony of PW1. PW1 has stated that there was grappling between the appellant No.1 and the deceased for 15 – 20 minutes, whereas, PW2 – Gitabai has nowhere reffered to such grappling. PW1 also pleaded ignorance about the multiple injuries caused to the appellant Nos.1 and 2. No blood stains were found in the field bearing Gut No.646 of PW1 (Panchanama – Exhibit-

41). On the contrary, blood was found in the field bearing Gut No.627 of the appellants. Therefore, the place of the incident itself was in dispute. This also raises doubt that appellant Nos.1 and 2 were ploughing their field, not together, but away from each other. The muffler, blood stained belonging to the deceased Shrihari was found in Gut No.627, (Panchanama – Exhibit-41). This further shows that the deceased had entered into the field of the appellants. The C.A. Report also does not disclose blood on the axe and on the wooden handle as observed by the learned trial Judge.

10. Another evidence, which has been relied by the prosecution and by the learned Additional Sessions Judge, is of PW2 – Gitabai, who has deposed categorically that one Shahadu Galande intervened in the quarrel and sent PW1 to the village. However, PW1 in his evidence has categorically deposed that Shahadu Galande did not come there when his father had fallen down. Even the presence of Shahadu at the place of the incident has not been deposed by PW2. As noted, this Shahadu Galande has not been examined by the prosecution, even though he was cited as a prosecutions witness. PW2 has deposed that the deceased Shrihari had

sustained bleeding injuries in her field but, Exhibit-41, the Panchanama, shows that the blood was found in the field Gut No.627 of the appellants. The blood marks of trampling were also found in the field of the appellants. On the point of alleged incident, there are apparent contradictions in the testimony of PW1, PW2 and PW3. PW2, in her cross-examination, has frankly admitted that she could not described how appellant No.2 had inflicted the blow with the axe on the head of the deceased. She also could not describe how the blow with the handle of the plough was inflicted by the appellant No.1 to the deceased. She could not specify the number of blows inflicted on the head of the deceased. This witness has further deposed that PW1 was standing at a distance of 500 feet from her and the deceased. This deposition is also contrary to the story depicted in Exhibit-23, as well as, the evidence of PW1. PW2 has also admitted in her evidence that the appellant No.1 had sustained injuries and was admitted in the hospital. The same were the injuries on the person of PW2.

11. PW3 – Laxmibai Bapu Patil is another eye witness, whose testimony is also contradictory to the version of PW1 and PW2. She had deposed that the blow of an axe was hit on the head of the deceased by

the appellant-Accused no.2 from the front side, whereas on the record, there is no injury on the frontal side of the head of the deceased. The injury infact was found on the vertex extending to the occipital region. The medical finding, therefore, nowhere supports the oral account of the assault as deposed by PW3. PW2 has deposed that she did not inform anybody regarding the incident till her evidence was recorded in the Court. She has further deposed that she was informed to depose in the Court as per her previous statement. PW3, however, has denied that the appellant No.1 had sustained head injury. This witness, therefore, has suppressed the various facts and is therefore unreliable. The material omissions, which she was unable to explain in her cross-examination, when confronted, also looses the strength of her testimony in support of the prosecution case. Further even PW1, 2 has nowhere, completely, supported the prosecution case. The contradictions and omissions of these witnesses raise various doubts to convict the appellant No.2 under Section 302 of the IPC.

12. PW7 – Balkisan Lalchand Malpani, a Panch witness to the discovery of the alleged weapon at the instance of the appellant No.2, is

also unreliable as in his cross-examination he has admitted to have being branded as habitual Police witness. Therefore the testimony of this witness has also lost its strength.

13. Therefore, according to us, the conviction of the appellant No.2 under Section 302 of the IPC, as imposed by the learned Additional Sessions Judge, is unsustainable and the same is quashed and set aside. However, the conviction under Section 325 of IPC and sentence, as imposed, is maintained. The rest of the impugned judgment and order is maintained against all the appellants.

14. Therefore, Appeal is partly allowed. Appellant no.2 be released forthwith, if not required for any other offences.

**[V.G. PALSHIKAR, J.]**

**[ANOOP V. MOHTA, J.]**